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In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPPOSITION TO MOTION TO AFFIRM AND REPLY TO RESPONSE TO THE JURISDICTIONAL STATEMENT

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1. As we argue in our jurisdictional statement, because the decision below effectively invalidates provisions of an important Act of Congress, and is based on a faulty constitutional analysis, the Court should note probable jurisdiction of the present appeal pursuant to the express review provision set forth in Section 561(b) of the Communications Decency Act of 1996 (CDA), 110 Stat. 143. The responses filed by the American Library Association, et al. (ALA appellees) and the American Civil Liberties Union, et al. (ACLU appellees) only reinforce the conclusion that the Court should grant plenary review. The ALA appellees acknowledge (Resp. 3) that this case "raises important constitutional questions regarding the application of traditional First Amendment principles to a new and increasingly important medium of communi-

cation," and that it is a case "of first impression." The ACLU appellees agree (Mot. to Aff. 17-18) that this case "is an important one," and that it "is the first case presented to the Court that directly addresses the application of traditional free speech principles to the rapidly evolving medium of online communications." Those considerations alone are sufficient to warrant plenary review. Indeed, the ALA appellees acknowledge as much, stating that "we do not oppose the government's request for plenary review." ALA Resp. 3.

2. The ACLU appellees nonetheless contend (Mot. to Aff. 16) that the decision below is so clearly correct under this Court's precedents that summary affirmance is warranted. And while the ALA appellees do not urge summary affirmance on that ground, they similarly contend (Resp. 3) that the decision below is "plainly correct."

As we demonstrate in our jurisdictional statement, however, the district court erred in holding unconstitutionally vague the CDA's restrictions on indecent and patently offensive communications. This Court's decisions in *Miller* v. *California*, 413 U.S. 15 (1973), and *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996), demonstrate that the CDA's restrictions give sufficient warning concerning what they do and do not prohibit to satisfy the First Amendment and the Due Process Clause. J.S. 17-19.

Appellees' sole response to our attack on the district court's vagueness ruling is to urge the Court to affirm the district court's decision on other grounds. ACLU Mot. to Aff. 27-28; ALA Resp. 10 n.7. They offer no substantive defense of the district court's vagueness ruling.

3. As we show in our jurisdictional statement (at 19-21), the district court also clearly erred in holding that the prohibitions contained in Sections 223(a)(1)(B) and

223(d)(1)(A) are facially unconstitutional. Both of those prohibitions restrict the dissemination of patently offensive, sexually explicit material to a particular person or persons, knowing that the person is under 18 years of age; neither significantly interferes with adult-to-adult communication. In their responses, neither the ACLU appellees nor the ALA appellees contend that Sections 223(a)(1)(B) and 223(d)(1)(A) are facially unconstitutional if construed in the manner that we have suggested.

Rather than conceding that the district court erred in enjoining those prohibitions, however, appellees urge the Court not to consider that issue because the government did not argue below that Sections 223(a)(1)(B) and 223(d)(1)(A) have a narrower scope than Section 223(d)(1)(B). ALA Resp. 24-26; ACLU Mot. to Aff. 25-26. Appellees are incorrect. The government expressly made that argument in its post-hearing brief:

> Before discussing the application of the defenses in Section 223(e) of the Act, defendants must first note that there should be no question at all as to the constitutionality of sections 223(a)(1)(B) and 223(d)(1)(A). Both provisions involve the *knowing* transmission of indecent material to a specific person under 18 (which differs importantly from section 223(d)'s prohibition, discussed *infra*, on "knowingly using an interactive service to display in a manner available to a person under 18 years of age" indecent material). Once the plaintiffs' meritless claim as to the alleged vagueness of the indecency standard is put to rest, *see supra*, there should be no constitutional barrier to prohibiting the transmission of indecency to a specific person known to be a minor.

Gov't Post-Hearing Memorandum of Points and Authorities 45 n.58.

The ACLU appellees contend (Mot. to Aff. 25-27) that Sections 223(a)(1)(B) and 223(d)(1)(A) will not bear the construction we have placed upon them. They argue (*id.* at 26) that those Sections must be construed to reach any communication "that might be seen by any minor" and that they are therefore subject to the same constitutional analysis as Section 223(d)(1)(B). But Section 223(a)(1)(B) expressly provides that a violation occurs only when someone initiates the transmission of an indecent communication, "knowing that the recipient of the communication is under 18 years of age." Under that statutory text, a violation does not occur simply because someone posting indecent information on the Internet is aware that minors who are linked to the Internet can seek and obtain access to the public portions of the Internet. ACLU Mot. to Aff. 26-27. Instead, the person initiating the indecent communication must *know* that a *specific recipient* of *his* message is under 18.

The same is true of Section 223(d)(1)(A), which provides that whoever "knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age" patently offensive communications shall be guilty of an offense. The ACLU appellees err in contending (Mot. to Aff. 26) that the knowledge requirement in Section 223(d)(1)(A) requires only knowledge that a computer is being used, not knowledge that the specific person receiving the message is under 18 years of age. Under well-established principles of statutory construction, the knowledge requirement applies to both elements of the offense. *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-469, 472 (1994).[1]

[1] Contrary to the ALA appellees' understanding (Resp. 24-26), we do not interpret Sections 223(a)(1)(B) and 223(d)(1)(A) as reaching only those situations in which the sender knows that the *only* persons receiving an indecent message are minors. Those Sections also apply when a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor.

4. The district court also erred in holding that Section 223(d)(1)(B) is facially unconstitutional. As we show in our jurisdictional statement (at 21-25), the statutory defenses to prosecution set forth in Section 223(e) afford sufficient opportunities for the communication of indecent speech to satisfy the applicable First Amendment standards.[2] Appellees attempt to rely on the district court's "finding" that the defenses are "effectively unavailable for non-commercial, not-for-profit entities." See ALA Resp. 9. That reliance is misplaced for several reasons.

a. First, the district court's "finding," even on its own terms, does not address one extremely important category of users who can take advantage of the statu-

[2] Although the CDA's restrictions on indecency satisfy the strictest First Amendment standard, we do not concede that such a standard controls this case or that it would apply in the same way in this context as in other contexts. For example, in deciding the appropriate level of scrutiny for government regulation of indecency, there are important similarities between television and the Internet: both intrude into the privacy of the home; project visual images that are capable of being stored; are unusually accessible to children; are used by children for substantial periods of time; and are difficult for parents to supervise effectively. See *Denver Area*, 116 S. Ct. at 2386-2387 (opinion of Breyer, J.). While the likelihood of inadvertent exposure to indecent material is not as significant on the Internet as on television, that difference does not necessarily warrant the application of a different legal standard. Indeed, because millions of people disseminate information on the Internet without the intervention of editors, network censors, or market disincentives, the indecency problem on the Internet is much more pronounced than it is on television.

tory defenses—commercial users. As we show in our jurisdictional statement (at 22), the credit card defense is clearly available to those users, and they are responsible for a significant amount of patently offensive, sexually explicit material available on the Internet today.

b. Second, and more fundamentally, the district court's "effectively unavailable" test is misconceived as a legal matter. The court did not limit that concept to situations in which current technology precludes reliance on the defense. The methods of compliance that we have outlined for non-commercial users—adult IDs for non-commercial web sites, and closed systems for chat rooms, mailing lists and newsgroups—are technologically feasible, and the district court did not find otherwise. The district court's conclusion that those methods of compliance are nevertheless effectively unavailable rests on the mistaken premise that a method of compliance is available only if it is essentially burden-free.

For example, the district court apparently rejected the use of adult ID services as an available option for non-commercial web sites in part because the displayers who happen to use existing services to screen access to their material at the present time are commercial pornographers, and appellees (or those who might seek access to their material) would not want to be associated with those displayers. See ALA Resp. 17 (citing J.S. App. 55a). That concern, however, does not make the adult ID option "effectively unavailable." Appellees have at least two "available" options. At no cost, they can use one of the existing services, in which case that service would no longer exclusively serve pornographic sites; or they can pool their considerable resources and establish their own adult ID service or induce another person to provide that service. In a setting like the Internet, that has responded rapidly to technological and market developments, it is in

keeping with First Amendment principles for Congress to rely on such developments to respond to the pressing need to keep indecent material from children. As a matter of law, then, such modest burdens do not render adult ID services effectively unavailable for non-commercial web sites.[3]

For the same reason, the district court erred in concluding that the statutory defenses are effectively unavailable for chat rooms, mailing lists, and newsgroups. Although users would have to incur some burdens in establishing a closed system, and in establishing a screening mechanism to ensure that only adults are admitted into the closed system, see J.S. 23-24, such burdens do not render those methods of communication effectively unavailable.

c. The district court's unavailability determination also rests on the mistaken view that someone who is interested in communicating patently offensive, sexually explicit material over the Internet has an unqualified First Amendment right to do so through every one of the Internet's modes of communication. For example, a person who already has a web site (or could readily establish one) can effectively disseminate indecent information while simultaneously screening out children. Nothing in this Court's First Amendment jurisprudence suggests that such a person must also have an opportunity to communicate that same indecent message through a newsgroup or a mailing list, when he could simply invite

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[3] The other reason given by the district court for rejecting adult ID as a viable option is also inadequate. While the government expert did not have personal knowledge of the existing services, J.S. App. 55a, the material submitted to the district court constituted probative evidence that such services can effectively screen children from web sites, and appellees offered no evidence to the contrary. See J.S. 23.

newsgroup or mailing list readers to visit his web site for the purpose of viewing that message. See J.S. 24-25.

5. Appellees contend that the district court's findings demonstrate that the CDA will not be effective in accomplishing its goal because it will not deter persons outside the country from posting indecent communications. ALA Resp. 20-22. In support of that contention, however, appellees cite only one district court finding—that approximately 40% of the content on the Internet originates outside the United States. *Id.* at 9 (citing J.S. App. 59a). The district court made no finding concerning what percentage of indecent speech originates outside the United States; it made no finding concerning the extent to which the CDA would deter the posting of indecent information outside the United States; and it reached no conclusion concerning the legal significance of any possible diminution of the CDA's effectiveness caused by indecency that originates from outside this country. Appellees rely on Judge Dalzell's statement that the CDA's restrictions "will almost certainly fail to accomplish the Government's interest." *Id.* at 20 (quoting J.S. App. 145a). But that statement was not joined by either of the other judges, and it is not supported by the district court's findings. It therefore provides no basis for affirming the district court's preliminary injunction.

6. Appellees similarly err in contending (ALA Resp. 22-23) that the district court's findings demonstrate that parental control software that attempts to screen out indecent information, such as Cyber Patrol or Surf Watch, is a less restrictive alternative that effectively serves the government's interests. The district court specifically found that such software cannot screen out sexually explicit images on a web site that are unaccompanied by suggestive text unless those who configure the software

are aware of the site. J.S. App. 42a. Even when screening software is used, it is therefore relatively easy to find sexually explicit sites. *Shea* v. *Reno*, 930 F. Supp. 916, 932 (S.D.N.Y. 1996). In addition, parental control software is used by a very small percentage of households with access to the Internet. For example, as of the time of the *Shea* decision, Surf Watch was used by only 450 individual households. *Ibid.* Thus, despite the district court's prediction that parental control software might soon be a reasonably effective method of screening indecent communication, J.S. App. 42a, the district court did not find that it is currently effective in serving the government's compelling interests, and it did not rely on the availability of parental control software as a basis for its ruling that the CDA's prohibitions are facially unconstitutional.

Appellees offer two additional alternatives that are even less effective in serving the government's compelling interests. Appellees propose (ALA Resp. 23) that parents use a screening mechanism that screens out *all* Internet speech that has not been affirmatively identified as appropriate for children by a particular rating service. Because only a very small fraction of Internet sites have been rated by any service, however, that option would force parents to dramatically limit the amount of information to which their children would have access. Appellees' other alternative is still more draconian—parents could "deny their children the opportunity to participate in the medium." *Ibid.* Far from being less restrictive, the two additional alternatives proposed by appellees would seriously undermine the government's ability to meet its substantial interest in furthering the First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information.

7. Finally, as we argue in our jurisdictional statement (at 25-26), even if one or more of the CDA's restrictions were unconstitutional as applied to some defined class of cases, the district court nonetheless erred in facially invalidating all three restrictions. Contrary to appellees' understanding (ALA Resp. 16; ACLU Mot. to Aff. 24-25), we do not argue that the district court should have construed the CDA's restrictions to reach only certain forms of communication; nor do we argue that the district court should have rewritten those statutory prohibitions. Instead, consistent with the statutory command in the applicable severability clause, 47 U.S.C. 608, we argue that the district court was required to limit injunctive relief to those applications of the statutory restrictions that it found unconstitutional. Under the severability clause, a determination that one of the CDA's provisions is unconstitutional as applied to particular persons or circumstances "shall not * * * affect[]" "the remainder of the chapter and the application of such provision to other persons or circumstances." 47 U.S.C. 608. Appellees offer no defense of the district court's failure to observe that requirement.

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For the foregoing reasons, as well as those stated in our jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

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Acting Solicitor General

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